16. EMPLOYEES WITH LIMITED STATUTORY PROTECTION

16.1: Managerial Employees [See also 34.19.]

"The National Labor Relations Act does not specifically exclude management officials from its coverage. However, the National Labor Relations Board has developed a body of case law which does provide for such an exclusion." **UD #1-77**

" 'The rationale for this policy [of excluding managerial employees], though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised "management" or were allied with it on the theory that they were the ones from whom the workers needed protection.' [**NLRB v Retail Clerks International Association, 366 F.2d at 645, 62 LRRM at 2839**]" **UD #14-80**

See also **UDs #22-77, #1-79, and #4-79** and **UM #2-75**.

"Section 39-31-103(2)(b)(iv) MCA excludes 'management officials' from the definition of public employee." **UD #7-89.**

See also **UD #15-87** and **UC #6-85**.

16.11: Managerial Employees – Definition

"After reviewing National Labor Relations Board decisions on the point, an appeals court decided that the National Labor Relations Board seems to use two tests in determining who is a managerial employee. He is either (1) one who, while not a supervisor, is so closely related to or aligned with management as to present a potential conflict of interest between employer and employees; or (2) one who formulates, determines. Or effectuates and employer's policies, and who has discretion in the performance of his job, but not if the discretion must conform to the employer's established policies." **UM #2-75**

"Section **59-1602(2), R.C.M. 1947**, excludes 'management officials' from the coverage of Montana's Collective Bargaining for Public Employees Act. Section **59-1902(4)** defines that term as: '… representatives of management having the authority to act for the agency on any matters relating to the implementation of agency policy'." **UC #1-77**

Managerial employees are "those who formulate and effectuate management policies by expressing and making operative the employer's decisions and those who have discretion in the performance of their jobs independent of their employer's established policy. The [Supreme] Court made it clear that those who perform routine work are not excluded. [**NLRB v. Bell Aerospace, 416 U.S. 267, 85 LRRM 2945**]" **ULP #29-82**. See also **UD #14-80**

"This Board has consistently construed this definition very narrowly and has only once ruled that a group of employees were excluded from the Act's coverage due to managerial status [that is, in *__UD #9-74__—Field Project Managers]." **UC #3-83**

See also **UDs #9-74 and #9-83**.

"The Board of Personnel Appeals has consistently construed this definition very narrowly, augmenting it with the definition of management employee adopted by the National Labor Relations Board." **UC #6-85**.

See also **UD #7-89**.

"Section **39-31-103(4) MCA** defines 'management official' as a representative of management having authority to act for the agency in any manners relating to the implementation of agency policy." **UD #7-89**.

"In ***NLRB v. Yeshiva University*, 444 US 672, 103 LRRM 2526, February 20, 1980** the Court said 'Managerial employees are defined as those who formulate and effectuate management policies....' They '...must exercise discretion within or even independently of established employer policy and must be aligned with management....normally an employee may be excluded as managerial only if he represents a management interest by taking or recommending discretionary actions that effectively control or implement employer policy....employees whose decision making is limited to the routine discharge of professional duties...cannot be excluded...even if union membership arguably may involve some divided loyalty....only if an employee's activities fall outside the scope of the duties routinely perform ed by similarly situated professionals will he be found aligned with management.'" **UD #7-89.**

"Managerial employees are defined as those employees who, 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' ***Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 21 LRRM 1039 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 85 LRRM 2945 (1974)." UC #6-89.**

"The Court in *Yeshiva*, *supra*, said that 'managerial employee must exercise discretion within or even in dependently of established employer policy and must be aligned with management.'" **UC #6-89.**

16.12: Managerial Employees – Indicia of Authority [See also 16.32 and 33.41.]

"The Board has never attempted a 'precise definition' of the term 'managerial employee'. Nevertheless in determining whether individuals are managerial employees a guideline has been whether certain non-supervisory employees

have a sufficient community of interest with the general group of employees constituting the bulk of a unit so that they may appropriately be considered a part thereof. In other words, where the interests of certain employees seem to lie more with those persons who formulate, determine, and oversee agency policy than with those in the proposed unit who merely carry out the resultant policy the board tends to exclude them from the unit." **UM #2-75**

"This Board has consistently construed this definition very narrowly and has only once ruled that a group of employees were excluded from the Act's coverage due to managerial status. That group of employees, the Field Project Managers in the Highway Department, had the authority to act for the agency on all matters relating to the construction of assigned projects. They were responsible for the administration and satisfactory completion of projects; they had the authority to reject defective materials, to suspend any work that was being improperly performed, and to cause unacceptable and unauthorized work to be remedied; their actions in rejecting materials or suspending work were taken on behalf of the agency and were of an independent nature which required no direct orders or commands from supervisors. (Decision In the Matter of the Field Project Managers Unit Determination, **UD #9-74**)." **UC #1-77**

"In determining whether or not the positions in question meet the statutory definition of 'management official,' the following factors must be considered: (1) the nature and effectiveness of any input into departmental policy or managerial decisions; (2) the types of any 'policy' or 'management' decisions made; (3) the type and amount of direction received, either in the form of verbal instruction or established rules, regulations, or policies; (4) the nature and degree of constraints and reviews affecting any 'policy' or 'managerial' decisions made; and (5) the specific areas of expertise in which 'policy' or 'managerial' decisions or recommendations may be made." **UC #1-77**

"[M]anagerial status … is reserved for those executive-type positions, those who are closely aligned with management as true representatives of management.' [**General Dynamics Corporation, 213 NLRB 124, 87 LRRM 1705 (1974)**]" **UD #14-80**

"The absence of discretionary authority coupled with the fact that she did not formulate policy serve to preclude the exclusion of her old position [head teacher] based on the management official definition General Dynamics Corporation [supra]" **ULP #29-82**

See also **UDs #9-77 and #1-79**.

"While technical expertise may involve the exercise of judgment and discretion, it does not confer executive type status upon the performer. ***General Dynamics Corp.,* [*Confair Aerospace Division,* 4213 NLRB 124, 87 LRRM 1705 (1974)]" UC #6-85**.

"However, where the National Labor Relations Board found that procurement buyers purchased at prices prescribed by management and use only limited discretion they were determined not to be managerial and they were included in the bargaining unit. ***Farmers Union Livestock et al and Local 239 Teamsters et al*, 38 LRRM 1404, 116 NLRB No. 133, September 12, 19 56." UD #7-89**.

"In **UC 6-85**, ***Lolo Public Schools v. Montana Education Association*, August 29, 1986** a Board of Personnel Appeals Hearing Examiner in a factual situation similar to that here determined...that the Business Assistant/Payroll Supervisor for the Lolo School District was not a managerial employee, even though that employee served as the employer's purchasing agent. The Hearing Examiner found that the Business Assistant/Payroll Supervisor (purchasing agent) displayed technical expertise but did not exercise sufficient independent judgment and discretion since her activities were circumscribed by policy, procedure, and the review power of higher authority. It is for those same reasons that the Missoula County High School District Purchasing Secretary is not a managerial employee and is not to be excluded from the bargaining unit." **UD #7-89**.

"The Board of Personnel Appeals has developed a test to use with regard to the management official exclusion (**UC #1-77, *Billings Firefighters and City of Billings*, January 19, 1977** approved by the Montana Supreme Court in ***Billings v. Firefighters Local 521, Board of Personnel Appeals, et al*, 113 LRRM 3324, 651 P.2d 627, 39 State Reporter 1944, September 28, 1982)." **UD #7-89**.

"In **UD 14-80 *Teamsters Local No. 2 v. Missoula County Airport*, September 2, 1980**…federal precedent was adopted denying managerial status to rank and file workers and to those who perform routinely, reserving the managerial exclusion to executive type positions, closely aligned with management, on the theory that they are the ones from whom the protections of the Act were designed to protect those covered by the Act. See **also UD 15 and 19-87 *Board of Regents and Montana Federation of Teachers, AFT, AFL-CIO, et al*, August 23, 1988." UD #7-89.**

16.2: Confidential Employees

"The central office assistant position... presently assists and will be assisting supervisors, particularly the superintendent, who are involved in personnel matters and the collective bargaining process.... [T]he NLRB has recognized such positions as being confidential. Moreover, it would be the rare instance where the superintendent's secretary would not be confidential. In fact, in **UC 2-87**...the superintendent's secretary was already excluded. It was only the secretary to the business manager who was not excluded. The facts in **UC 2-87**

are distinguishable. The central office assistant is a confidential employee under 39-31-103(12) MCA." **UD #12-88**.

See also **UDs #15-87 and #23-90** and **ULP #54-89**.

16.21: Confidential Employees

"Montana's Collective Bargaining Act for Public Employees excludes confidential employees from its coverage… [A confidential employee is] defined as 'any person found by the Board [of Personnel Appeals] to be a confidential labor relations employee…;." **UD #24-79**

"The National Labor Relations Board defined confidential employee 'so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations'." **UD #8-83**

"In 1981 the United States Supreme Court affirmed the NLRB's long-standing policy of narrowly defining 'confidential employees' as those who 'assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations,' ***NLRB v. Hendricks County Rural Electric Membership Corp.*** **454 U.S. 170 (1981)." UD #23-90** and **UC #3-91**.

See also **UDs #4-85 and #7-89** and **ULP #54-89**.

16.22: Confidential Employees – Standards [See also 33.43.]

Accounting clerks III and Clerk Stenographer II were included in the unit on the grounds that access to confidential information is not grounds for exclusion. **UD #25-74**. See also **UD #6-74**

Exclusion of classified personnel in the President's Office and the Personnel Office on the grounds of handling confidential materials is not allowed. Employees in these offices are included in the bargaining unit consisting of all non-academic employees. **UD #30-74**

"As we pointed out in the hearing examiner's decision in … **UD #18-79**, … the criteria used by the Board of Personnel Appeals to determine whether one is a confidential labor relations employee should be those set forth in **Siemens Corp., 224 NLRB 216, 92 LRRM 1455 (1976)**. There the National Labor Relations Board held that if the employee acts in a confidential capacity, during the normal course of duties, to a person who is involved in formulating, determining and effectuating the employer's labor relations policy, he or she should be excluded from any appropriate unit. Prior to Siemens the National Labor Relations Board had held to a stricter definition of confidential employee." **UC #4-79**

"Access to information that may be used during labor negotiations or responsibility for compiling information that might be related to labor relations is not sufficient to exclude an employee as confidential." **UD #8-83**.

"The test for determining confidential employee status is two pronged….To be excluded … the management official whom she/he assists must be involved in formulating, determining and effectuating labor relations policies *and* the employee must have access to confidential labor relations information in the normal course of employment." **UD #27-79**. See also **UD #8-83**.

"Generally, the National Labor Relations Board has identified those persons who 'formulate, determine and effectuate management policies in the field of labor relations' as people who actually sit at the bargaining table." **UC #6-79**

"If the superior cannot pass the test neither can an assistant, i.e., there can be no confidential labor relations employee unless the boss passes muster." **UD #1-80**

On "one hand the employee or position occupied by the employee must act, or have the responsibility of acting, in a confidential capacity…. [On the] other hand the superior must be involved in labor relations to the degree suggested previously." **UD #7-80**

"[C]onfidential exclusion … should be construed narrowly…. [They] should not apply unless the superior has significant involvement in formulating … and then only if the employee's primary duty is to assist such superior." **UD #7-80**

See also **UDs #18-76, #6-77, #22-77, #1-79, #4-79, and #1-82**.

"The U.S. Supreme Court in a 1981 case reviewed the National Labor Relations Board's policy regarding the exclusion of confidential employees from bargaining units of regular employees and held that the long-standing practice of excluding only those confidential employees who satisfied the Board's labor-nexus test has a reasonable basis in law. ***NLRB vs. Hendricks County Rural Electric Membership Corp.*, 353 U.S. 170, 108 LRRM 3105 (1981), Rev'g. 67 F.2d 766, 104 LRRM 3158 (CA. 7)**." **UD #15-87**.

"The fact that employees have access to confidential information of a business nature will not serve to exclude them from a bargaining unit so long as the information does not relate to labor relations matters. ***Minneapolis - Moline Company*, 24 LRRM 1443 (1949)**." **UD #15-87.**

"In **UD 15 and 19-87, *Board of Regents and Montana Federation of Teachers, AFT, AFL-CIO**, et al*, August 23, 1988 the criteria adopted by the Board of Personnel Appeals to determine whether one is a confidential

employee is that set forth in ***Siemens Corporation and Local 3, IBEW*, 224 NLRB No. 216, 92 LRRM 1455, June 21, 1976**. There the National Labor Relations Board held that if the employee acts in a confidential capacity, during the normal course of duties, to a person who is involved in formulating, determining and effectuating the employer's labor relations policy, he or she should be excluded from the bargaining unit. **See UC 4-79, *Lewis and Clark County v. Montana Public Employees Association*, April 3, 1980** and **UD 18-79, *Montana Public Employees Association v. Montana Department of Labor and Industry,* October 22, 1979**...." **UD #7-89**. See also **UD #23-90** and **UC #3-91**.

"[T]he test for determining confidential employee status is two pronged. To be excluded from the bargaining unit as a confidential employee, the management officials one assists must be involved in formulating, determining and effectuating labor relations policies, *and* one must have access to confidential labor relations information in the normal course of employment. See **UD 8-83, *Montana Public Employees Association v. City of Great Falls*, February 7, 1984**; **UD #1-80, *Montana Federation of Teachers v. Kalispell School District No. 5*, May 12, 1980**...." **UD #7-89**. See also **UC #2-87**.

"Presence at the bargaining table is a strong indicator of an official who is involved in the formulating, determining and effectuating of labor relations policy, **UC #6-79**." **UC #2-87**.

"The three positions do all have access to confidential personnel records. This in and of itself is insufficient grounds for exclusion. See **UD #27-79**." **UC #2-87**.

"[I]ncidental or occasional assistance [to the management official] does not warrant confidential employee status nor does less than significant involvement on the part of the assisted management official warrant such status. **UD 7 and 8-80, *Montana Public Employees Association v. Yellowstone County School District No. 2*, January 9, 1981**." **UD #7-89**.

"Access to personnel or statistical information upon which labor relations policy is based is not sufficient to establish confidential status. Mere access to personnel files alone is not sufficient to confer confidential employee status. ***Eisenberg v. Honeycomb Plastics Corporation*, 125 LRRM 3257, DC New Jersey, January 9, 1987** and **288 NLRB No. 51, 130 LRRM 1511, April 8, 1988**. Access to information that may be used during collective bargaining or responsibility for compiling labor relations information is not sufficient to confer confidential employee status. **UD 24-79 *American Federation of State County and Municipal Employees State Council No. 9 v. Havre School District16-A*, February 28, 1980.**" **UD #7-89**. See also **UD #23-90** and **UC #3-91**.

"The NLRB has repeatedly held that the mere handling of or access to confidential business or even labor relations information is insufficient to render

a person an excluded 'confidential' employee, ***Ernst & Ernst Nat'l Warehouse*, 228 NLRB 162, 100 LRRM 1297 (1979)**." **UD #23-90** and **UC #3-91**.

"'Confidential exclusions...should be construed narrowly... [They] should not apply unless the superior has significant involvement in formulating...and then only if the employee's primary duty is to assist such superior.' ***MPEA & Yellowstone County School District No. 2*, UD 7-80 (1981)**." **UD #23-90**.

See also **UC #3-91**.

See also **UD #6-88** and **ULP #54-89**.

16.3: Supervisors [See also 34.19.]

"[T]here is no disability *per se* occasioned by supervisory employees belonging to a union and being represented by them for collective bargaining…. Even the federal law which denies authority to the NLRB, either to include supervisors in bargaining units with other employees or to establish units composed entirely of supervisory personnel, allows supervisors to organize even though they are not covered by the Act and employers are not forbidden to engage in voluntary bargaining with the organizations that represent them…. No such restrictions existed in state law at the time of the certification. Quite the contrary, the state formerly recognized and entered into an agreement with the Union covering these employees…." **ULP #2-73**

"Whether or not Benton was a supervisory employee is not a question that I [the Hearing Examiner] can entertain. That question was decided by the agent of the Board of Personnel Appeals who conducted the Union election…." **ULP #3-73**

Supervisory personnel are allowed to remain in an existing grandfathered unit if they pass the Board of Personnel Appeals' two-part test which determines (1) the nature of each position and (2) whether including the supervisory positions would create and actual substantial conflict. **UC #1-77 Montana Supreme Court (1982)**

"The issue, as raised by the union, is whether this Board should allow ballot challenges, based on the supervisory exclusionary language of **39-31-103 MCA**, at a decertification election where the employee or position being challenged is included in the existing unit….. Questions of the propriety of the unit do no belong in such proceedings and the Board, under its own rules, is not authorized to deal with it as part of the proceedings." **DC #11-79**

See also **UDs #22-77, #1-79, and #4-79**.

"Public employers in Montana do not face the same problem that is encountered by private sector employers who sometimes allow their foreman

and first-line supervisory personnel to be members of a union that represents the employer's workers. Most of the National Labor Relations Board case law addresses problems caused by that arrangement, problems of loyalty and allegiance. The Montana Act excludes supervisors from the coverage of the act. Section 39-31-103(3) MCA." **ULP #20-89**.

See also **UDs #4-85, #15-87, #12-88 and #7-89** and **UCs #5-85, #4-90, and #8-91**.

16.31: Supervisors – Definition

" 'Supervisory employee' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." **ULP #3-73**

See also **UD #8-83**; **UCs #1-77, #3-79, #7-80, #6-82, and #2-84**; and **ULP #11-78.**

"Section 39-31-103(2)(b)(iii) MCA excludes supervisory employee from the definition of public employee. Section 39-31-103(3) MCA defines supervisory employee as one having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment. Similar language is found in the **National Labor Relations Act at 29 USC 151(11).** The existence or exercise of any one of the above authorities enumerated in the above definition of supervisory employee combined with independent judgment is sufficient to confer supervisory status regardless of how seldom the power is exercised. However, the fact that an employee gives minor orders or 'supervises' the work of others in the common sense of the word does not necessarily make that employee a 'supervisor' within the meaning of the statute. ***George C. Foss Company v. NLRB*, 118 LRRM 2746, 752 F.2d 1407, 1985 CA 9**...." **UD #7-89**.

See also **UCs #9-88 and #4-90**.

"The exercise of authority to assign or direct work when exercised in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. ***Delta Mills, Inc.,* 287 NLRB No. 38, December 16, 1987, 127 LRRM 1170**; ***NLRB v. McEver Engineering*, 121 LRRM 3125, 752 F.23 634, 1986 CA 5**." **UD #7-89.**

See also **UD #6-88** and **UC #5-85**.

16.32: Standards [See also 16.12 and 33.42.]

"This Board considers the decision of who is a supervisor and who isn't the concern of the employer, the bargaining unit representative, and this Board. We do not consider the individual employee to have the proper standing to asset whether or not he is a supervisor." **DR #2-76**

Lack of authority to hire or discharge personnel or to effectively recommend such action is a basis for *not excluding* Youth Camp Counsellor III and Plan Supervisor L from the unit. **UD #26-74**

Responsibility for making purchases under a prescribed budget which employee did not help formulate is not grounds for exclusion from the unit. Neither is supervision of one other member of the bargaining unit when both are performing identical functions. **UD #61-74**

Directors and/or coordinators who engage in more than *infrequent* supervisory responsibilities are excluded from the bargaining unit. (Reference is made to the Adelphi University decision [195 NLRB 644] as not being applicable.) **UD #66S-74**

There is no basis for exclusion of positions that are more lead worker positions than supervisory. **UD #18-76**

"[T]he definition of a supervisor as outlined in Section **59-1602(3**) … [includes]: A … have the authority in the interest of the employer to perform the actions: (1) transfer; (2) temporarily suspend; (3) assign' (4) discipline; (5) direct; and (6) adjust grievances….B. … effectively recommend through the use of independent judgment the following actions: (1) transfer; (2) suspension; (3) promotion; and (4) reward." **UD #24-76**

Section **59-1602(3)** does *not* indicate that a supervisor must have all specific responsibilities indicated. **UD #36-75**.

"The National Labor Relations Act's definition of the term 'supervisor' is nearly identical to Montana's. The National Labor Relations Board … has consistently held that this definition 'is written in the disjunctive, and so just the possession of any one of the listed powers is sufficient to cause the possessor to be classified as a supervisor…'." **UC #1-77**. See also **UD #9-83** and **UC #3-83**.

"The National Labor Relations Board holds that possession of one of the listed powers is sufficient to classify the individual as a supervisor …. In addition to actually exercising one or more of the enumerated powers, a person may be

excluded as a supervisor if he can effectively recommend a listed power. However, whether in actual performance of in making a recommendation, to be excluded as a supervisor, one must exercise independent judgment…." **UC #6-80** See also **UC #7-80**.

"In determining supervisory status, the responsibilities of hiring, transferring, etc. are considered as a whole. That is, to be determined supervisory an employee must exercise a number of these responsibilities." **UC #3-79** See also **UC #2-84**.

"[T]he specific question at hand [is] are the positions in question supervisory and/or managerial and, if so, does their inclusion in the bargaining unit create actual substantial conflict which results in compromising the interests of any party to its detriment…. I have relied most heavily on evidence pertaining to duties and responsibilities actually incumbent upon the Specialty Officers, Battalion Chiefs, and Captains, and to evidence indicative of conflict caused by the current composition of the bargaining unit. Proportionately less weight has been given to evidence regarding such factors as differences in uniforms, use of vehicles, training, desires of employees, etc., matters which might weigh more heavily were this a new unit determination rather than a clarification of an already existing bargaining unit." **UC #1-77**

" '[W]hether or not he may properly continue to be included in the unit in the future will depend upon the amount of time he regularly spends in the performance of supervisory duties.' [**Adelphi University, 195 NLRB 644, 79 LRRM 1552 (1972)**] **UD #21-77**

"Determination of whether or not departmental chairs are to be included in the unit must be made on the present duties of the position, not on speculation of what those duties will be at some future date." **UD #21-77**

"The direction [the police Captain and Sergeants] give men on shift appears to be more the type given by a lead worker than that given by a supervisor…. The amount of time the Captain and Sergeants spend directing men on shift, coupled with their authority to suspend, is not sufficient to cause them to be excluded from the unit as supervisors." **UD #22-78**

The approach used by the National Labor Relations Board for "determining supervisory status of registered nurses will be adopted here. That is, the traditional indices of supervision will be weighted to see whether they are being exercised in the interest of the employer or in the interest of the treatment of the patients." **UC #3-79** See also **UC #2-84**.

"Exercising independent judgment is a key factor in determining if an employee is supervisory." **UD #7-79**

"[T]he Cascade County Treasurer is not separate and autonomous and … the Cascade County Treasurer cannot effectively negotiate with his employees in the area of monetary matters…. [He has] the same initial power as set forth in the definition of supervisory employee." **ULP #19-79**

"The determination of whether an individual is a supervisor under the [Montana Public Employees Collective Bargaining Act] should be made after a close examination of that person's duties not the title or job classification…. It is a question of one's authority to act as a representative of the employer in relation with other employees and whether one actually exercises independent judgment in making, or effectively recommending those personnel actions listed in the statute." **UD #29-79**

"When the employee's exercise of authority is routine in nature, i.e. it follows established procedures, the position should not be excluded." **UD #29-79**

"What they were or were not earlier is of no consequence. If the evidence shows them to be supervisory they should be excluded; if it does not, they will remain in the unit." **UC #6-80**

"This Board must look behind the appearances of certain said-to-exist authority in order to determine whether alleged supervisory personnel actually exercise substantial discretion with respect to those statutory criteria or whether they merely make routine, broadly reviewable decisions." **UD #1-80**

"The NLRB has long held that an abnormal proportion of supervisors to employees should be a factor in distinguishing between try supervisors and other minor supervisory employees." **UD #29-79**. See also **UD #14-80**.

"Although some of the duties performed … indicate supervisory authority … minor supervisory employees are not 'supervisory employees' … but are more properly called lead workers." **UD #14-80**

"In general, an employee who can effectively recommend an action is one whose word is acted on without question." **UD #23-80**

"Generally, the NLRB terms positions with some leadership responsibilities … as lead workers when the employees who do no have the authority to hire or discharge, transfer, suspend, lay-off, recall etc. also spend most of their time working alongside other employees performing the same duties." **UD #23-80**

"[L]ead teacher duties and responsibilities are included in the definition of supervisory employee…. Therefore the position of lead teacher is excluded….." **UD #22-81**

“The head teacher is nothing more than a lead worker…. Further, there is nothing in the record to show that Ms. Howe used independent judgment in carrying out ‘supervisory’ responsibilities even if one assumed, for the sake of argument, she had the necessary authority or that she effectively recommended any of the action.” **ULP #29-82**

“The National Labor Relations Board does distinguish between true supervisors and minor supervisors employees (i.e. subforeman, crew leaders, gang pushers, set-up men or straw bosses). Some of the major considerations developed by the National Labor Relations Board used to make this distinction are: (1) whether or not the employee has the independent authority to hire, fire, adjust grievances, discipline, or give raises or other benefits; (2) assignment and direction of work, is routine in nature, i.e., follows established procedures; (3) whether or not the employee exercises independent judgment, particularly in the area of directing the activities of others; (4) whether or not the employee’s recommendations regarding personnel matters are subject to independent review/investigation by a higher authority; (5) whether or not there are several layers of supervision above the employee; (6) whether or not a substantial amount of the employee’s time is spent doing work which is similar to the work of the personnel he/she allegedly supervises; and (7) whether or not a determination that the employee9s0 in question were supervisory would create an unrealistic and excessively high ration of supervisors to employees.” **UC #6-82** See also **UC #1-77** and **UDs #7-79, #14-80, and #9-83**.

“This authority must not be exercised merely in a routine or clerical way. This Board gives those duties of hiring, discharging, transferring, suspending, laying off, and recalling workers the most weight in making the determination of supervisory status. The term effective recommendation is open to various interpretations, but in general, an employee who can effectively recommend an action is one whose work is acted on without question.” **UD #8-83**

“The status of supervisory employees is not to be construed so broadly that persons are denied employee rights which the statute was designed to protect.” **UD #9-83**

“For supervisory status to exist, the position must substantially identify the employee with management…. An employee may have potential powers, but theoretical or paper power will not make him a supervisory. Some kinship to management, some empathic relationship between employer and employee must exist before the employee becomes a supervisor for the employer.” **UD #9-83**

“[A] position’s duties, not its title, salary, or minimum qualifications, are determinative of its eligibility for bargaining unit status.” **UC #5-83**

"It is the function rather than the label [of the position] that is significant…. Categorizing employees as supervisory for purposes of classification is of little significance to a proper determination of their status…. It is the actual nature of the work being performed by the employees that is significant." **UD #9-83**

"Directing and assigning work by a skilled employee to less skilled employees does not involve the use of independent judgment when it is incidental to the application of the skilled employee's technical or professional knowledge." **UD #9-83**

"It is the employee's regular functions, not temporary or occasional service as a supervisor that is determinative of status." **UD #9-83** See also **UCs #3-83 and #2-84.**

"The National Labor Relations Board consistently holds that employees who spend most of their time working alongside other employees are not supervisors within the meaning of the act." **UC #2-84**

"[S]pasmodic and infrequent assumption of a position of command and responsibility does not transform an otherwise rank and file worker into a 'supervisor'." **UC #2-84** See also **UD #9-83**.

See also **UDs #60S-74, #8-77, #17-77, #22-77, #24-78, #1-79, #26-79, and #12-81** and **ULP #3-73**.

"The following considerations for determining supervisory status were recommended by a hearing examiner and later adopted by this Board in ***Billings Firefighters Local 521 v. City of Billings*, UC 1-77**: ●Whether the employee has independent authority to perform the functions enumerated in the Act. ●Whether the exercise of authority in the area of assignment and direction is routine. ●Whether the employee uses independent judgment in directing the activities of others. ●Whether the recommendations made by the employee are subject to independent review or investigation. ●Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates. ●Whether an unrealistic and excessively high ratio of supervisors to employees would be created. (citations omitted)." **UDs #4-85 and #15-87**.

"The hiring authority she has exercised in the past combined with plans for her continued authority in this area indicates that Ms. Morrow should not be part of the bargaining unit. The fact that it has been a number of years since Ms. Morrow exercised her hiring authority is immaterial." **UC #5-85**.

"[T]he ratio of supervisors to employees is only one factor determining supervisory status and when duties indicate supervisory responsibility, the

NLRB has held that individuals who supervise only a single employee are supervisors within the meaning of the Act." **UC #5- 85**.

"The National Labor Relations Board has long held that, because the enumerated personnel actions contained in the statute are listed in the disjunctive, possession of any one of them is sufficient to make an employee a supervisor." **UD #15-87**.

"In the event that the twelve initial tests are not met or in the event that there are borderline questions as to whether the individual is a supervisory employee the NLRB has looked to certain secondary tests such as the employee being designated a supervisor; the fact that he is regarded by himself or others as a supervisor; the exercise of privileges accorded only to supervisors; attendance at instructional sessions or meetings held for supervisory personnel; responsibility for a shift or phases or operation; authority to interpret or transmit employer's instructions to other employees; responsibility for inspecting the work of others; instruction of other employees; authority to grant or deny leave of absence to others; responsibility for reporting rule infractions; keeping of time records on other employees; receipt of substantially greater pay than other employees, not based solely on skill; and failure to receive overtime." **UD #6-88**.

"In State government there is perhaps a more defined chain of command in terms of hiring and firing decisions than there is in the private sector." **UD #6-88**.

"In short, with the exception of the Administrative Assistant II position, and other than in the areas of layoff and recall, the employer has demonstrated that the positions it requests to be excluded do meet many of the primary tests set down. The positions also meet a substantial number of the secondary tests." **UD #6-88**.

"Frank Haughn and Shirley Roberts....are engaged in primarily run of the mill operations involving little discretion and judgment. Their involvement in personnel matters is of a routine almost bookkeeping nature. This coupled with the fact that they oversee part time workers, and few of them at that, leads to the conclusion that they are lead workers (see **UD 14-80** and **UD 23-80**) rather than supervisors as defined in 39-31-103(3) MCA." **UD #12-88**.

There is a distinction between employees vested with some limited supervisory power, such as 'straw bosses,' leadmen, set-up men and other minor supervisory employees, and the supervisor vested with such genuine management prerogatives as the right to hire, fire, discipline or make effective recommendations with respect to such action. ***NLRB v. Don's Olney Foods*, 130 LRRM 317 1, March 21, 1989 CA 7** enforcing ***Olney IGA Food Liner*, 126 LRRM 1254, 286 NLRB No. 75, October 22, 1987**." **UD #7-89**.

See also **UD #15-87**.

"The gradations are so infinite and subtle that the federal courts have given the National Labor Relations Board a large measure of informed discretion in exercising its responsibilities to determine who is a supervisor." **UD #15-87**.

"In order to be supervisory, the direction of other work must be responsible. To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether 'direction' is responsible, the focus is in on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. ***NLRB v. KDFW-TV, Inc.*, 122 LRRM 2502, 790 F.2d 1273, 1986 CA 5**." **UD #7-89**.

"Actual duties not merely job titles or classifications are to be considered. The employee's actual job duties, responsibilities, authority and relationship to are determinative of supervisory status. ***NLRB v. Chicago Metallic Corporation*, 122 LRRM 3163, 794 F.2d 527, 1986 CA 9**; ***NLRB v. Health Care Logistics, Inc.,* 121 LRRM 2872, 784 F.2d 232, 1986 CA 6**. Supervisor status based upon technical expertise rather than a role in directing and disciplining employees does not result in supervisory exclusion from the bargaining unit. ***Misericordia Hospital Medical Center v. NLRB*, 104 LRRM 2666, 623 F.2d 8, 1980 CA 2**, ***Judd Valve Company, Inc.*, 284 NLRB No. 18, March 4, 1980, 103 LRRM 1380**." **UD #7-89**.

"In **UC 1-77**, ***Billings Firefighters and City of Billings*, January 19, 1977** confirmed by the Montana Supreme Court in ***Billings v. Firefighters Local 521, Board of Personnel Appeals, et al*, 113 LRRM 3324, 651 P.2d 627, 39 State Reporter 1844, September 28, 1982,** the Board of Personnel Appeals adopted" a test to determine supervisory status. **UD #7-89**.

"The hiring and firing authority and practices of Eastmont supervisors are subject to the same limitations applicable to other supervisors in state government. State government supervisors are subject to greater review than their private sector counterparts." **UC #9-88.**

"While the hiring and firing practice of supervisors at the Eastmont Human Services Center are subject to the same limitations as all supervisors in state government, it is the relationship of the evaluation and disciplinary role to the whole organization that is important. See ***NLRB v. Beacon Light Nursing Home*, 125 LRRM 3414, 825 F.2d 1076, CA 6, (1987)**." **UC #9-88**.

16.4: Other Employees [See also 33.45.]

See **UDs #54-74 and #18-79**.

"[T]he Legislature, when adopting the Montana Collective Bargaining for Public Employees Act, decided that professional engineers and engineers in training are not public employees. See Section 39-31-103 MCA." **UD #5-89**.

"The Employer's proposal to exclude one of three Programmer/Analyst positions presents another problem in that an exclusion is sought for an individual rather than a position. Such an exclusion would be in conflict with the principle set forth in *Gorman [Basic Text on Labor Law]*." **UD #7-89**.

"Refusing to be governed by an employer's classification system which may allow an employer unilateral control over voter eligibility, the National Labor Relations Board has applied two standards to determine the eligibility of temporary employees to vote in representational elections, temporary employees being defined as workers hired as less than permanent employees. Using the first standard the NLRB has held that temporary employees employed on the eligibility date and whose tenure of employment remains uncertain are eligible to vote. Under the second standard, perhaps a better test, known as the date certain test, an employee, fully aware that his/her employment is short lived, but having no definite termination date, is eligible to vote in a representation election if he/she is employed on both the eligibility date and the date of the election. See ***NLRB v. New England Lithographic Company*, 100 LRRM 2001, 1978 CA 1, 589 F.2d 29**; ***Universal Paper Goods v. NLRB*, 102 LRRM 2218, 1979 CA 9, 638 F.2d 1159**." **UD #7-89**.

16.41: Other Employees – Elected and Appointed Officials

See **UD #1-79** and **ULPs #11-78 and #19-79**.

"If Section 39-31-103(b)(vii) . . . contemplated excluding multiple clerks in each school district, we would have a situation where all 'clerks' or clerical employees in any school district could be excluded from the protection of the Act. Such a reading of the Public Employees Collective Bargaining Act is not logical." **UC #6-85.**

16.42: Other Employees – Consultants

See **UD #22-77**.

16.43: Other Employees – Part Time Employees [See also 34.34.]

"I [the Hearing Examiner] am convinced that using 80 hours per month, or as per state statute, 20 hours per week, as the determining sole factor for deciding which employees, who work less than full time, are included in a bargaining unit would be improper.: **UD #24-78**

"The only real difference between the two hourly employees and the others is that they work fewer hours." **UD #7-80**

See also **UDs #4-74, #13-74, #21-77, #18-79, and #2-80** and **UM #1-75**.

"The general rule regarding part-time employees is they will be included in the bargaining unit if the regularity and frequency of their employment, along with other factors, show they gave a substantial community of interest with the unit's full-time employees in wages, hours and conditions of employment." **UD #4-85**.

"The National Labor Relations Board executed a major policy change in 1973 when it decided to exclude part-time faculty from a faculty bargaining unit, ***New York University (I)*****, 205 NLRB No. 16, July 20, 1973, 83 LRRM 1549**. In that decision the National Labor Relations Board said: '...there is no real mutuality of interest between the part-time and full-time faculty...because of the differences with respect to (1) compensation, (2) participation in University governance, (3) eligibility for tenure and (4) working conditions.' In the case at hand it has been determined that the non-tenurable appointees of the Montana State University faculty receive lower salaries, do not have the right to vote and have less advantageous working conditions. See ***Kendall College v. NLRB*****, 570 F.2d 216, 97 LRRM 2878, 7 CA 1978**." **UD #5-89**.

"In ***Berea Publishing Company*****, 140 NLRB No. 55, January 7, 1963, 52 LRRM 1051** the National Labor Relations Board stated: 'In cases involving employees who work only part-time for an employer, the Board determines unit inclusion on the basis of whether the employee is regularly employed for sufficient periods of time to demonstrate that he, along with the full-time employees, has a substantial interest in the units wages, hours, and conditions of employment (footnote omitted).'" **UD #7-89**.

"Part-time employees who averaged four (4) hours per week during the six (6) months prior to the eligibility date were considered eligible to vote in ***NLRB v. Western Temporary Services*****, 125 LRRM 2787, 1987 CA 7, 821 F.2d 1258**. If regular part-time employees share a sufficient community of interest with their full-time counter parts, the number of hours worked should not deny these employees the fullest freedom to exercise their rights guaranteed in the Montana Collective Bargaining for Public Employees Act. See ***Shepards Uniform and Linen Supply*****, 274 NLRB No. 200, March 29, 1985, 118 LRRM 1607** and **UD 7 and 8-80, *Montana Public Employees Association v. Yellowstone County School District No. 2*, January 9, 1981**. The test for determining whether an employee is a regular part-time employee or a casual employee takes into account factors such as regularity and continuity of employment and similarity of work duties. ***Tri State Transportation Company v. Teamsters Local 25*****, 289 NLRB No. 38 , June 27, 1988, 128 LRRM 1246**. It would be arbitrary to include part-time employees merely because they work less than twenty (20) hours per week or less than half time without first

considering any community of interest they may have with employees working more than half time." **UD #7-89**.

See also **UD #16-89** and **ULP #67-89**.

16.44: Other Employees – Casual Employees [See also 34.392.]

"The NLRB has made a distinction between 'casual' employees who are not included in a bargaining group and 'regular part-time' employees who are included. However … [one must use a] case by case basis relative to the entire employment relationship of part-time employees in order to determine the extent of a shared community of interest with full-time employees." **UD #24-78**

"The National Labor Relations Board practice of including seasonal or temporary employees in the bargaining unit only if they share a sufficient community of interest with the regular employees or if they have a reasonable expectation of reemployment from year to year will serve as guidance on this question." **UD #2-80**

"Temporary or casual employees are distinguished from regular part-time employees and are not included in the bargaining unit." **UD #4-85**.

"[S]tudents are not excluded because they are students, but rather because, in many cases, they lack a community of interest with other workers." **UD #4-85**.

"Casual or 'sporadic and intermittent' employees are generally excluded from the bargaining unit. See ***NLRB v. Emro Marketing Company*, 119 LRRM 3367, 1985 CA 7, 768 F.2d 151**; ***Saint Elizabeth Community Hospital v. NLRB* 113 LRRM 3157, 1983 CA 9, 78 F.2d 1436**; ***National Posters v. NLRB*, 114 LRRM 3240, 1983 CA 4, 720 F.2d 1358**. Such a practice would exclude substitutes from the bargaining unit inasmuch as their employment is sporadic and intermittent. The nature of their employment prevents a substantial community of interest with regular employees. See ***NLRB v. Boston Beef Company, Inc.*, 107 LRRM 3 090, 1981 CA 1, 652 F.2d 223." UD #7-89**.

16.45: Other Employees – Probationary Employees [34.33.]

"Upon examination of the Collective Bargaining Act for Public Employees, … the rules of this Board relating to determining appropriate bargaining units (**ARM 24.26.511**) and Section **7-32-106 MCA** which defines "employee" or "subordinate employee" of a police department, I cannot find that probationary employees are not eligible to belong to a collective bargaining unit." **DC #6-78**

"The fact that probationary police officers are identical to regular or 'confirmed' police officers in all respects except for the two minor differences addressed above [a 'slight' increase in pay at the time of becoming confirmed and access

to an appeals procedure] surely warrants their inclusion in the bargaining unit." **UD #26-79**. See also **UD #36-75**.

See also **ULP #30-79** (related to non-tenured teachers) and **Nye v. Department of Livestock (1982).**

"Pursuant to Section 2-18-102, MCA the Department of Administration has promulgated Rules, **Administrative Rules of Montana 2.21.3808 through 2.21.3812**, dealing with probationary employees. Accordingly, an employee may be discharged at any time during this six month probationary period. The probationary period may be extended. Mike Mahan was such a probationary employee." **ULP #1-87**.

"The Collective Bargaining Agreement specifically precludes Ms. Bagnell's grievance under contract because she was a probationary, seasonal employee with less than three months service." **ULP #24-92**.

See also **ULP #27-87**.

16.46: Other Employees – Seasonal Employees [See also 34.391.]

"The National Labor Relations Board practice of including seasonal or temporary employees in the bargaining unit only if they share a sufficient community of interest with the regular employees or if they have a reasonable expectation of reemployment from year to year will serve as guidance on this question." **UD #2-80**